

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

JENNIFER P. WOODS,	:	
Plaintiff,	:	
v.	:	CA 2:12-00727-KD-C
CAROLYN W. COLVIN,	:	
Acting Commissioner of Social Security,	:	
Defendant.	:	

REPORT AND RECOMMENDATION

This matter is before the Court on the plaintiff's application for attorney fees under the Equal Access to Justice Act (the "EAJA") (Doc. 19) and the Commissioner's response (Doc. 21)—agreeing to the requested amount of attorney fees, but asserting that any award should be made payable to the plaintiff directly. The EAJA petition has been referred to the undersigned for entry of a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B).

Upon consideration of all pertinent materials contained in this file, it is **RECOMMENDED** that the plaintiff should receive a reasonable attorney's fee in the amount of **\$734.68** under the EAJA for legal services rendered by her attorney in this Court. See *Astrue v. Ratliff*, ___ U.S. ___, 130 S. Ct. 2521, 2526 & 2526-27 (2010) ("Ratliff [] asserts that subsection (d)(1)(A)'s use of the verb 'award' renders § 2412(d) fees payable directly to a prevailing party's attorney[.] . . . We disagree. . . . The plain meaning of the word 'award' in subsection (d)(1)(A) is [] that the court shall 'give or assign by . . . judicial determination' to the 'prevailing party' (here, Ratliff's client Ree) attorney's fees in the amount sought and substantiated under, inter alia, subsection (d)(1)(B). . . . The fact that the statute awards to the prevailing party fees in which her

attorney may have a beneficial interest or a contractual right does not establish that the statute ‘awards’ the fees directly to the attorney. For the reasons we have explained, the statute’s plain text does the opposite—it ‘awards’ the fees to the litigant[.]’); *see also Brown v. Astrue*, 271 Fed. App’x 741, 743 (10th Cir. Mar. 27, 2008) (“The district court correctly held that Mr. Brown’s assignment of his right in the fees award to counsel does not overcome the clear EAJA mandate that the award is to him as the prevailing party, and the fees belong to him. Thus, the district court correctly declined to award the fees directly to counsel.”). The Court therefore disregards the Assignment (Doc. 19-4) appended to the plaintiff’s application.¹

Discussion

On April 5, 2013, the Court entered a Rule 58 judgment reversing and remanding this cause to the Commissioner of Social Security pursuant to sentence four of 42 U.S.C. § 405(g) for further proceedings. (Doc. 18; *see also* Doc. 16, report and recommendation; Doc. 17, order adopting report and recommendation.) In the motion for an award of attorney’s fees under the EAJA (Doc. 19), filed on May 8, 2013, the plaintiff requests attorney’s fees in the amount of \$734.68 to compensate her attorney

¹ When, as is the case here, the Court is provided an executed “assignment,”

[i]n light of *Ratliff*, [the best] practice [is] to simply award the EAJA fees directly to Plaintiff as the prevailing party and remain silent regarding the direction of payment of those fees. It is not the duty of the Court to determine whether Plaintiff owes a debt to the government that may be satisfied, in whole or in part, from the EAJA fees award. The Court leaves it to the discretion of the Commissioner to determine whether to honor Plaintiff’s assignment of EAJA fees.

Varner v. Astrue, No. 3:09-cv-1026-J-TEM, 2011 WL 2682131, at *2 (M.D. Fla. July 11, 2011); *accord Dacosta-Lima v. Astrue*, No. 3:11-cv-777-J-32TEM, 2012 WL 177398, at *3 (M.D. Fla. Jan. 23, 2012); *Morris v. Astrue*, No. 2:09-CV-595-FtM-36SPC, 2012 WL 260041, at *2 (M.D. Fla. Jan. 30, 2012).

for the time (four (4) hours) spent representing her before this Court as of the date of the filing of the fee application (*see id.* at 1). The Commissioner does not oppose the amount of fees requested. (*See generally* Doc. 21.)

The Equal Access to Justice Act requires a district court to “award to a prevailing party . . . fees and other expenses . . . incurred by that party in any civil action . . . , including proceedings for judicial review of agency action, brought by or against the United States . . . , unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.” 28 U.S.C. § 2412(d)(1)(A). It is imminently clear in this case that the plaintiff is a prevailing party under the EAJA,² and that the position of the United States in this case was not substantially justified, the defendant having made no arguments to the contrary.

The EAJA requires a prevailing party to file an application for attorney’s fees within thirty (30) days of final judgment in the action. 28 U.S.C. § 2412(d)(1)(B). The thirty-day clock will not begin to run in this case until the Court’s April 5, 2013 Judgment and Order—adopting the undersigned’s recommendation that the Commissioner’s decision be reversed and remanded—became final, which will occur at the end of the sixty (60) days for appeal provided under Rule 4(a)(1)(B)(iii) of the Federal Rules of Appellate Procedure, *see Shalala v. Schaefer*, 509 U.S. 292, 302 (1993), that is, June 4, 2013. The application filed in this case, bearing a date of May 3, 2013, while premature, is nevertheless timely. *See Myers v. Sullivan*, 916 F.2d 659, 679 n.20 (11th Cir. 1990) (“Even a premature [EAJA] motion is considered timely.”) (citations omitted);

² “[A] party who wins a sentence-four remand order is a prevailing party.” *Shalala v. Schaefer*, 509 U.S. 292, 302 (1993). (*See* Doc. 18, Judgment.)

see also *Hayward v. Astrue*, No. CA 09-0453-C, 2010 WL 682507, at *1 (S.D. Ala. Feb. 22, 2010) (same).

Like 42 U.S.C. § 1988, the EAJA is a fee-shifting statute. And the Supreme Court has indicated that “the most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.” *Watford v. Heckler*, 765 F.2d 1562, 1568 (11th Cir. 1985) (EAJA) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (§ 1988)); see *Jean v. Nelson*, 863 F.2d 759, 772-773 (11th Cir. 1988) (discussing the reasonableness of the hours expended in the context of contentions by the government that the fee requests were not supported by sufficient documentation and often involved a duplication of effort), *aff’d sub nom. Commissioner, I.N.S. v. Jean*, 496 U.S. 154 (1990).

This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer’s services. The party seeking an award of fees should submit evidence supporting the hours worked and the rates claimed. Where the documentation of hours is inadequate, the district court may reduce the award accordingly. The district court also should exclude from this initial fee calculation hours that were not “reasonably expended.” . . . Cases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. “In the private sector, ‘billing judgment’ is an important component in fee setting. It is no less important here. Hours that are not properly billed to one’s client also are not properly billed to one’s *adversary* pursuant to statutory authority.”

Hensley, 461 U.S. at 433-34 (citations omitted); see also *id.* at 437 (“[T]he fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates.”); *ACLU of Ga. v. Barnes*, 168 F.3d 423, 428 (11th Cir. 1999) (“If fee applicants do not exercise billing judgment, courts are

obligated to do it for them, to cut the amount of hours for which payment is sought, pruning out those that are ‘excessive, redundant, or otherwise unnecessary.’ Courts are not authorized to be generous with the money of others, and it is as much the duty of courts to see that excessive fees and expenses are not awarded as it is to see that an adequate amount is awarded.”); *Norman v. Housing Auth. of City of Montgomery*, 836 F.2d 1292, 1301 (11th Cir. 1988) (“Excluding excessive or otherwise unnecessary hours under the rubric of ‘billing judgment’ means that a lawyer may not be compensated for hours spent on activities for which he would not bill a client of means who was seriously intent on vindicating similar rights, recognizing that in the private sector the economically rational person engages in some cost benefit analysis.”).

In *Norman*, the Eleventh Circuit indicated that “the measure of reasonable hours is determined by the profession’s judgment of the time that may be conscionably billed and not the least time in which it might theoretically have been done.” 836 F.2d at 1306. Because the Commissioner interposes no objection to the fee petition, the Court finds that the plaintiff’s counsel reasonably spent ten and ninety-five/hundredths (10.95) hours on legal tasks in this case.

With respect to a determination of the hourly rate to apply in a given EAJA case, for services performed by attorneys, the express language of the Act, as amended by the Contract with America Advancement Act of 1996, provides in pertinent part as follows:

The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that . . . attorney fees shall not be awarded in excess of \$125.00 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

28 U.S.C. § 2412(d)(2)(A) (Cum. Supp. 1997). In *Meyer v. Sullivan*, 958 F.2d 1029 (11th Cir. 1992), the Eleventh Circuit determined that the EAJA establishes a two-step analysis for determining the appropriate hourly rate to be applied in calculating attorney's fees under the Act.

The first step in the analysis, . . . is to determine the market rate for "similar services [provided] by lawyers of reasonably comparable skills, experience, and reputation." . . . The second step, which is needed only if the market rate is greater than \$[125] per hour, is to determine whether the court should adjust the hourly fee upward from \$[125] to take into account an increase in the cost of living, or a special factor.

Id. at 1033-1034 (citations and footnote omitted).

For years, the prevailing market rate in the Southern District of Alabama has been \$125.00 per hour. See, e.g., *Willits v. Massanari*, CA 00-0530-RV-C; *Boggs v. Massanari*, 00-0408-P-C; *Boone v. Apfel*, CA 99-0965-CB-L. The Court, however, has adjusted that rate to account for the increase in the cost of living. *Lucy v. Barnhart*, CA 06-0147-C, Doc. 32. More specifically, the Court has adopted the following formula to be used in calculating all future awards of attorney's fees under the EAJA: "“(\$125/hour) x (CPI-U Annual Average “All Items Index,” South Urban, for month and year of temporal midpoint)/ 152.4, where 152.4 equals the CPI-U of March 1996, the month and year in which the \$125 cap was enacted.”” (*Id.* at 11 (quoting Doc. 31 at 2).)

The temporal midpoint in this case was January 2013, the complaint having been prepared and filed on November 29, 2012 (Doc. 1), and the Court having entered its order and judgment on April 5, 2013 (Docs. 17, 18). The Court takes notice that the CPI-U for January 2013 was 223.933. (See Doc. 19-3.) Plugging the relevant numbers into the foregoing formula renders the following equation: $(\$125 \times 223.933) / 152.4$. Completion of this equation renders an hourly rate of **\$183.67**. In consideration of the

foregoing, the plaintiff should be awarded an attorney's fee in the amount of **\$734.68** under the EAJA for the **four (4) hours** her attorney spent performing work traditionally performed by attorneys in Social Security cases.

Conclusion

Therefore, the undersigned **RECOMMENDS** that the plaintiff be awarded attorney's fees in the amount of **\$734.68** under the Equal Access to Justice Act.

A copy of this report and recommendation shall be served on all parties in the manner provided by law. Any party who objects to this recommendation or anything in it must, within fourteen (14) days of the date of service of this document, file specific written objections with the Clerk of this Court. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b); S.D. ALA. L.R. 72.4. In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the Magistrate Judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the Magistrate Judge is not specific.

DONE this the 16th day of May, 2013.

s/WILLIAM E. CASSADY
UNITED STATES MAGISTRATE JUDGE